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In the Supreme Court
of the United States

October Term, 1956

No. ~~[illegible]~~ 121

WILLIA NIUKKANEN, also known as William Niukkanen, also known as William Albert Mackie,

Petitioner,

vs.

JOHN P. BOYD, District Director, Immigration and Naturalization Service, United States Department of Justice, JOHN WILSON, Officer in Charge, Immigration and Naturalization Service Office,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable, the Chief Justice of the United States, and the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, Willia Niukkanen, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on February 8, 1957.

CITATION TO OPINIONS BELOW

The opinion of the United States District Court for the District of Oregon is dated March 2, 1956, and appears at 148 Fed. Supp. 106. The opinion of the United States Court of Appeals for the Ninth Circuit is dated February 8, 1957, and appears at 241 F (2d) 938. The opinion of the District Court is contained in the Transcript of Record filed herewith at page 20. The opinion of the Court of Appeals is included in Appendix I to this petition.

Tht opinion of the Board of Immigration Appeals dated September 8, 1953, finding Petitioner deportable commences at page 69 of the Transcript of Record, and the order of the Board dated May 1 ,1955, denying Petitioner suspension of deportation commences at page 79 of the Transcript of Record.

JURISDICTION

The judgment of the Court of Appeals was entered on February 8, 1957. A petition for rehearing was timely filed and was denied on April 9, 1957 The jurisdiction of this Court is invoked under 28 USC 1254 (1).

QUESTIONS PRESENTED

Petitioner was born in Finland in 1908 and entered this country less than a year later. He married an American citizen and he supports her and her child, and in part, his parents, from his trade of painting. He has

been ordered deported on the ground that he allegedly was a member of the Communist party of the United States during the years 1937-39. Moreover, his application for suspension of deportation has been denied by the Board of Immigration Appeals.

The questions presented by this petition are:

1. Whether 8 USC 1251 (a) (6) (C) violates the Constitution of the United States by reason of

(a) being a Bill of Attainder;

(b) being an Ex Post Facto law.

(c) violating Due Process of Law; and

(d) infringing on freedom of speech.

2. Whether there was "reasonable, substantial and probative evidence" that Petitioner was a member of the Communist Party.

3. Whether there was proof that such membership, if it existed, was more than nominal membership. *Galvan v. Press*, 347 U.S. 522, 527.

4. Whether the Government's refusal to suspend deportation was an abuse of discretion and based upon an erroneous administrative interpretation of the law.

STATUTES INVOLVED

8 USC 1251 (a) (6) (C), 1252 (b) (4) and 1254 (a) (5), insofar as relevant here, reads as follows:

> Sec. 1251 (a) (6) (C): "Any alien in the United States . . . shall, upon the order of the Attorney

General, be deported who . . . is or at any time has been, after entry, a member of any of the following classes of aliens:

". . . aliens who are members of or affiliated with (i) the Communist Party of the United States . . ." Sec. 1253 (b) (4): ". . . no decision of deportability shall be valid unless it is based upon reasonable, substantial and probative evidence."

Sec. 1254 (a) (5): "As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted to permanent residence, in the case of an alien who is deportable under paragraphs (4) - (7) . . . of section 1251 (a) of this title for an act committed or status acquired subsequent to such entry into the United States or having last entered the United States within two years prior to, or at any time after June 27, 1952, is deportable under paragraph (2) of section 1251 (a) of this title as a person who has remained longer in the United States than the period for which he was admitted; has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this chapter in deportation proceedings up to the

time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence."

STATEMENT OF THE CASE

The jurisdiction of the United States District Court for the District of Oregon was invoked under Title 28, USC, section 2241, 62 Stat. 964, and Title 5, USC, section 1009, 60 Stat. 237.

Petitioner* and his parents have resided in the United States since 1909 and in Portland, Oregon for about 33 years where Petitioner follows the trade of painting. His father is a tailor who works only four or five days a week because of ill health (R. 174-5). His mother suffers from diabetes and impaired eyesight (Tr. 173-174) and Petitioner renders financial and other aid to his parents (R. 173, 175). His mother is aged 78 and his father is a couple of years older (R. 171).

Petitioner is the only surviving son of his parents, a brother having been killed during World War II on a ship near Wake Island (R. 172). Petitioner himself was drafted in 1944 and served 95 days in the Army, receiving an Honorable Discharge for medical reasons (Tr. 8, 9).

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*The transcript of the hearings before the Immigration Office will be referred to as "(Tr.)", and the record made in the District Court will be referred to as "(R.)".

On June 17, 1952, a warrant for the arrest and deportation of Petitioner was issued by John P. Boyd, District Director of the Immigration and Naturalization Service and the same was served upon Petitioner on or about September 12, 1952. The basis of the warrant was the allegation that Petitioner has been a member of the Communist Party of the United States after entry into the United States during the years 1937-39.

After various hearings, Petitioner was ordered deported and his application for suspension of deportation was denied. The District Court and the Court of Appeals upheld the Government's decisions.

The Government called only two witnesses, Walter R. P. Wilmot and Lee Arthur Knipe. The Board of Immigration Appeals discounted the testimony of Knipe because he lied during the hearing and at other deportation hearings by denying a prior criminal conviction in California. Wilmot admitted that at the time Petitioner was alleged to be a Communist, Wilmot himself was a very heavy drinker.

No testimony was offered that Petitioner was more than a nominal member of the Communist party, if he was a member. No testimony was offered as to Petitioner's knowledge of the political nature of the Communist party, or its ideological viewpoint except that Knipe admitted Petitioner didn't advocate violence and was primarily concerned with problems of unemployment (Tr. 72).

Petitioner did not testify in the deportation hearing, but on the hearing of his application for suspension, he denied that he was a Communist party member at any time (Tr. 203, 204).

REASONS FOR GRANTING THE WRIT

I. The Statute Under Which Petitioner Was Ordered Deported Is Unconstitutional.

The Statute is a Bill of Attainder. The Court in *Galvan v. Press*, 347 U.S. 522, and *Harisiades v. Shaughnessy*, 342 U.S. 580, did not rule on the question of whether the Act is an unconstitutional Bill of Attainder. We believe that it is, and that it is vital for the many aliens now involved in deportation proceedings that the issue be decided by the Court.

A bill of attainder is "a legislative act which inflicts punishment without judicial trial," *Cummings v. Missouri*, 71 U.S. 277. As the Court said in *United States v. Lovett*, 328 U.S. 303, 315: ". . . legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without judicial trial are bills of attainder prohibited by the Constitution."

The Act in question here is clearly within these definitions.

The Statute is an Ex Post Facto Law. We believe that the Court's decision in *Galvan* which sustained the

statute should be reconsidered and overruled because *Galvan*'s holding that the Act is not an ex post facto law is based on the erroneous assumption that no deportation is a punishment. Perhaps in certain cases, expulsion from the country is justified where there is a reasonable relationship between it and the health, safety and morals of the nation. But in this case, the Government concedes that Petitioner has led an exemplary life since the alleged Communist association, served honorably in the armed forces, and provided a decent home for his family. His expulsion would serve no purpose insofar as the security or health of the nation is concerned. In truth, it would be nothing more than blind, irrational vengeance upon a man who is alleged to have been a member of group which membership was a lawful act at the time it is alleged it was committed.

At the time Petitioner was alleged to have been a member, that was no finding that the Communist party advocated violence. As late as 1943, the Supreme Court in *Schneiderman v. U. S.*, 320 U.S. 118, held that the question of whether the Communist Party advocated violence was an open one. Not until 1950 did Congress make a legislative finding that the Communist Party advocated violent overthrow of the government.

Even if the bare membership of Appellant is conceded *arguendo*, such affiliation took place at a time when Appellant had no notice, judicial or legislative, that his association with Communists was wrongful and that as a result he would be subject to deportation. Since the Act imposes a punishment in the form of banishment,

it is an ex *post facto* law and should be struck down as violative of the United States Constitution.

The Statute Violates Due Process of Law. The first objection to the statute is that it is special legislation. Under this law — unique in American jurisprudence — aliens — are expelled for membership in a specifically named organization, the Communist Party. Member in an organization in itself is the basis of classification by the Act; in effect it says that membership alone is the sign of guilt. The Act closes its eyes to motive, scienter, and acts of its victims; mistake and repentance alike fail to redeem those condemned for mere membership.

Not only does the Act offend the deepest sense of fair play by condemning persons because of bare membership in the Communist Party, but for all practical purposes it proposes to expel aliens who might have been members of this organization by a legislative determination that all members of that organization were guilty of thinking, saying, or doing things against the best interests of the nation. Even if Congress were correct in its judgment that the Communist Party is a pernicious organization, it cannot attach its guilt to individuals by reason of their membership alone. Such a fiat is, on its face, irrational and shocking to the inborn sense of fairness which is, in truth, the essence of due process.

Due process requires that a deprivation of liberty "shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be obtained." *Nebbia v. New York*, 291 U.S. 502, 525.

Guilt by association — this is the nub of the statute —is a barbarous and uncivilized offender of the standards of the Constitution. If an alien commit an act against this nation, if he works as a knowing partner in a conspiracy to harm the land which has accepted him, then let him be punished and deported. But to rule that membership alone in an organization constitutes guilt, without proof that the alien was aware of its evil purposes or an active participant in its subterfuges and plots, is the nadir of decency.

Nearly twenty years ago, the climate of opinion and the state of public knowledge was far different than it is today. Then, thousands joined the Communist party to further social and economic objectives which were espoused, not alone by Communists but also by members of legitimate and long-established political parties. Hundreds of thousands believed the Communist Party to be just another legitimate organization. Intelligent persons who now are "expert witnesses" in our courts admit to having been "duped" by Communism in the nineteen-thirties. Certainly a simple Finnish immigrant laborer might reasonably be excused for accepting the appearance of an organization that fooled so many others.

Nor is the Court's position sound, taken in *Harisiades v. Shaughnessy*, 342 U.S. 580, that substantive due process does not apply to the expulsion of aliens. It is conceded by all that aliens are entitled to procedural due process. So they must be entitled to substantive due process, for there is only one due process clause.

Harisiades is based upon three erroneous assumptions. First, it is said that the alien resides here on sufferance which is not a matter of right but only of permission. But due process protects privileges as well as "rights," such as the privilege of government employment. *Slowchower v. Board of Higher Education*, 350 U.S. 551; *Wiemann v. Updegraff*, 344 U.S. 183; *United Public Workers v. Mitchell*, 330 U.S. 75.

It is also stated in *Harisiades* that the power of expulsion is "largely immune from judicial inquiry or interference" because it is interwoven with the war power, the conduct of foreign affairs, and the maintenance of republican form of government. 342 U.S. 588-89.

But in reality expulsion of aliens is not a tool of foreign policy, and deportation seldom involves negotiations with foreign governments. The mere fact that an alien is the subject of deportation proceedings does not make the process of deportation a matter of foreign policy any more than the fact that an alien is prosecuted for a crime makes that proceeding into an arm of foreign policy.

Finally, it is implied that the alien brings all of his trouble upon himself by not obtaining citizenship. Even if it were true, this would be no cause for denying him fair play. However, the assumption is fraught with obvious error, for some of the aliens cannot qualify for citizenship because of restrictive laws and restrictive administration of these laws. Moreover, some aliens erroneously believe themselves to be citizens.

The basic attitude which underlies the decisions in both *Galvan* and *Harisiades* is that aliens are here by sufferance and the nation owes them nothing because they contribute nothing in return for the hospitality. This view is as false as it is novel. The Founding Fathers welcomed immigration, and through immigration this nation prospered and developed. Immigrant hands toiled to link the country with railroads, harvest our crops, cut our forests, tend the looms, and make the steel that built America. The continent was settled by immigrants who gave their children to populate the land. The immigrants of today have only remote ties with the countries of their origin. Petitioner has lived all but less than a year in America, has married an American citizen and been as a father to his wife's American child. Aliens as a group, and Petitioner in particular, are entitled to decent treatment under law. Due process — fairness — is a mighty shield to protect the liberties of all persons in this land. To deprive the alien of its comfort is to weaken the moral fiber of America.

The Act Infringes Upon Freedom of Speech. In *Harisiades*, an extensive and unjustifiable interference with freedom of speech was sanctioned. There, the statute required the government to prove that the organization to which the alien belonged advocated violence before he could be expelled.

The Act here goes beyond that considered in *Harisiades*. No finding that the Communist Party, or the alien in question, advocated violence is necessary. Deportation follows from mere membership.

Thus the invasion of freedom of speech permitted in *Harisiades* has been compounded in the 1950 Act. Certainly as applied to this Petitioner, the Act constitutes an unjustifiable interference with his right of expression and association and therefore it should be held unconstitutional.

2. There Is No Reasonable, Substantial and Probative Evidence That Petitioner Was a Member of the Communist Party, and the Evidence Produced by the Government Is Tainted With Perjury.

The Government called only two witnesses; on the basis of their testimony alone it seeks to deport Petitioner. The witness Knipe admitted that he perjured himself in denying that he had been convicted of a felony. During the course of the hearing, both the Special Inquiry Officer and the prosecutor, the Examining Officer went to some lengths to protect Knipe from the efforts of Petitioner's counsel to impeach his veracity. Later, however, after an adjournment, Knipe was permitted to admit his conviction of the crime of forgery in California. One may assume that the Government reversed its position after it had become aware of the error which had been made in its effort to conceal Knipe's criminal record.

This Court has held that in a criminal proceeding, the use by the Government of an admitted perjurer voids a conviction, even where the perjury was committed in another case. *Mesarosh v. United States*, 352 U.S. 1. While the case at bar is not a criminal proceed-

ing in the technical sense of the word, in truth it has many of the earmarks of such a case and the penalty which is sought to be imposed upon Petitioner is as severe as that which might be attendant upon the conviction of a crime. But the technical distinction as to whether the proceeding is criminal bears no relevance to the principle announced in *Mesarosh*: "The dignity of the United States Government will not permit the conviction of any person on tainted testimony." 352 U.S. 9. Certainly in matters so serious as deportation, the same high standards of fair play and honesty which are required of the Government in criminal cases should apply.

The witness Wilmot testified that he knew Petitioner as a Communist Party member some seventeen years before. At that time, he was admittedly a heavy drinker and this fact impugns his capacity for truthful recollection. Moreover, Wilmot's testimony contains such vagueness and at the same time, such precise descriptions of minor, long-past events, as to make his veracity highly doubtful. Certainly this evidence, taken together with that of the perjurer Knipe, can hardly be said to be so reasonable, substantial and probative as to justify Petitioner's deportation.

3. If Petitioner Was a Member of the Communist Party, There Is No Evidence That It Was More Than Nominal Membership.

As this Court said in *Galvan*: "It is enough that the alien joined the Party, aware that he was joining an

organization known as the Communist Party *which operates as a distinct and active political organization,* and that he did so of his own free will." 347 U.S. 528. (Emphasis added.)

In the case at bar, the record is absolutely devoid of evidence that Petitioner knew of the political character, or for that matter, the political goals of the Communist Party when he allegedly was a member. Even the Government witness Knipe made it clear that Petitioner, as a supposed member of the Communist Party, was only concerned with "bread and butter" economic issues such as unemployment and relief during those depression days. The testimony given by Petitioner during the hearing on his application for suspension shows conclusively that he was not even aware of the political theories and ends of the Communist Party.

It will be recalled that during depression days, one of the Communist Party's attractions to the poor, the jobless, and those suffering economically was its professed concern for the betterment of the lot of working people. Surely every person who may have associated with the Communist Party out of sympathy for such ends cannot automatically be impugned with knowledge and sympathy toward Communist political goals. Proof is required; and proof is totally lacking in this case.

4. The Government's Refusal to Suspend Deportation Was an Abuse of Discretion and Was Based on an Erroneous Interpretation of Law.

We refer the Court to the decision of the Board of Immigration Appeals at R. 79. While the opinion is anything but clear, as nearly as we can decipher it, it appears that the Board refused to grant suspension for two primary reasons: (1) that Petitioner failed to satisfy the Board that he was not affiliated with the Communist Party after 1940, and (2) that Petitioner refused to give the names of persons he has associated with since the deportation proceedings began, particularly members of the Oregon Committee for the Protection of the Foreign Born.

As for the first point, the Board itself admits there is no evidence tending to show that Petitioner was a member of the Party after 1939 (R. 82) Petitioner denied that he ever was a member, but the Board persists in attacking his credibility because he fails to "answer the questions asked of him with respect to the Communist Party and his being a member thereof." (R. 84.) If this be grounds for denial of suspension of deportation, the net result would be to mark every alien who resists identification as a Communist with the tag of perjury. Thus in every proceeding, the accused would be torn between denying membership in the Party and facing, as a result, certain denial of suspension if the Board found that he was a member, and, as the alternative, admitting membership regardless of the truth, and throwing himself on the mercy of the Government.

Surely such a result cannot be a lawful exercise of administrative discretion.

As for Petitioner's refusal to give certain names requested of him, there was no evidence that these persons or the Oregon Committee were in any way connected with Communism. Thus the questions were entirely immaterial to the determination of Petitioner's eligibility for suspension, and it was error on the part of the Government to base its decision in any part upon his refusal to answer them.

CONCLUSION

For the foregoing reasons, the writ should issue.

Respectfully submitted,

REUBEN LENSKE,
Attorney for Petitioner.

APPENDIX I

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIA NIUKKANEN, also known as William Niukkanen, also known as William Albert Mackie,

Appellant,

vs.

JOHN P. BOYD, District Director, Immigration and Naturalization Service, United States Department of Justice, JOHN WILSON, Officer in Charge, Immigration and Naturalization Service Office,

Appellees.

No. 15,061
Feb. 8, 1957

Appeal from the United States District Court
for the District of Oregon

BEFORE: STEPHENS and FEE, Circuit Judges, and LINDBERG, District Judge

PER CURIAM

This appeal is from an order of the District Court dismissing appellant's petition for a writ of habeas corpus and injunctive relief, discharging the writ of habeas corpus earlier issued, and remanding appellant to the Immigration Service for deportation to Finland. On the

grounds and for the reasons stated in the district court's opinion, ... F. Supp. ....., the order appealed from is affirmed.

(Endorsed:) Per Curiam Opinion. Filed Feb. 8, 1957.

Paul P. O'Brien, Clerk.

APPENDIX II

Judgment of the Court of Appeals

[Title of Court and Cause]

Judgment

Appeal from the United States District Court
for the District of Oregon

This cause came on to be heard on the Transcript of Record from the United States District Court for the District of Oregon, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the Judgment of the said District Court be, and hereby is affirmed.

(ENDORSED) Judgment

Filed and Entered: February 8, 1957
PAUL P. O'BRIEN, Clerk.